

January 25, 2005

To Our Massachusetts Business Clients:

In yet another disturbing indicator of the growing anti-business climate in Massachusetts, the Attorney General's office has issued a frightening Advisory interpreting an obscure piece of legislation that apparently slipped by the various business lobbying organizations this past summer.

Basically, the state now has a 3-prong test to determine Employee versus Independent Contractor status, something that has long been the purview of the Internal Revenue Service. Prongs 1 and 3 are similar to the federal tests, but prong 2 is unique and appears impossible to meet for many circumstances.

Here is a quote concerning prong 2:

2. Service Outside the Usual Course of Employer's Business

To qualify as an independent contractor, the worker's job or service also must be performed "outside the usual course of business of the employer." M.G.L. c. 149, § 148B (a) (2). Hence, *a worker who performs the same type of work that is part of the normal service delivered by the employer may not be treated as an independent contractor. Cf. Canning's Case, 283 Mass. 196 (1933) (pipe fitter hired to install steam pipes in factory was engaged in the usual course of the employer's business, therefore, he was an employee entitled to worker's compensation coverage).*

The apparent impact is that employers must now withhold Massachusetts taxes, contribute to unemployment compensation, and provide worker's compensation coverage for individuals presently treated as independent contractors.

In what would be bizarre or Kafkaesque in fiction were it not the fact, the legislation imposes draconian civil penalties for even first-time violators.

Violations also carry a potential maximum penalty of [not more than \$25,000 for first violation] up to \$50,000 per civil violation, as well as prison time and criminal fines for criminal violations. The Independent Contractor Law creates broad liability for both business entities and individuals, including corporate officers, and those with management responsibility over affected workers.

We will monitor the status of the new law, but urge you to review your own situation and contact our office and/or legal counsel for guidance.

Sincerely,

Dietrich & Wilson, PC